FILED
DEC 10 1992
OFFICE OF THE CLERK

92-1240

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

JOSEPH PARILLO,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOHN FRAZIER JACKSON
Ohio Sup. Ct. # 0024393
665 South High Street
Columbus, Ohio 43215
(614) 445-8823
Counsel of Record

PAUL CROUSHORE
Ohio Sup. Ct. # 055524
601 South High Street
Columbus, Ohio 43215
(614) 224-9999
Counsel for Petitioner

QUESTIONS PRESENTED

In a prosecution for mail fraud and violation of the National Stolen Property Act, where the United States seeks to admit a "pro forma" insurance policy created after the alleged fraud as direct evidence of the fraud:

1) must the United States show and the court find unavailability and lack of fault for the court to admit the evidence?

2) does the definition of "duplicate" used by the Sixth Circuit Court of Appeals perform the functions intended by Rule 1001(4) of the Federal Rules of Evidence?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

OPINIONS BELOW 2

JURISDICTION 2

STATUTE AND RULES INVOLVED..... 3

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE WRIT 12

I. The implicit holding that unavailability and lack of fault need not be shown before introducing secondary evidence of material contract terms is in conflict with decisions of this Court..... 13

II. The holding that a duplicate is anything which differs from a document in an explicable manner is in conflict the plain language and intent of Rule 1001(4) and of other Circuit Courts..... 16

CONCLUSION 21

APPENDIX 1a

TABLE OF AUTHORITIES

Cases:

United States v. Alexander, 326 F.2d 736 (1st Cir. 1964)..... 18

United States v. Carroll, 860 F.2d 500 (1st Cir. 1988)..... 17

United States v. Gerhart, 538 F.2d 807 (8th Cir. 1976)..... 18

United States v. Manton, 107 F.2d 834 (2d Cir. 1938), *cert.denied* 309 U.S. 664 (1940).....17-18

United States v. Sutter, 62 U.S. (21 How.), 170 (1858).....14-15

Williams v. Craig, 1 Dall 313, 1 Law.Ed. 153 (PA Sup. Ct. 1788)(M'Kean, C.J.).... 14

Miscellaneous:

Advisory Committee's Note to Rule 1003.. 19

Annotation, *Admissibility of Duplicates Under Rules 1001(4) and 1003 of Federal Rules of Evidence*, 72 ALR Fed 732..... 18

Federal Rules of Evidence, Rule 1001(4)..... 16

1 Greenleaf, Evidence 93 (1842)..... 14

McCormick on Evidence § 231 (3d ed. 1984)..... 14

5 Weinstein's Evidence § 1001(3)[01]....18-19

5 Weinstein's Evidence § 1002[03]..... 19

4 Wigmore, *Evidence* § 1242 (Chadbourn rev. 1972)..... 20

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOSEPH PARILLO,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The petitioner Joseph Parillo respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled proceeding on July 28, 1992, and denial of petitioner's petition for rehearing and suggestion for rehearing *en banc*, entered on September 11, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit has not been reported. It is reprinted in the appendix hereto, p. 7a, *infra*.

The oral decision of the United States District Court for the Southern District of Ohio (Kinneary, Judge), issued from the bench at trial of this case, is reprinted in the appendix hereto, p. 1a, *infra*.

JURISDICTION

This case arose under Title 18 United States Code (U.S.C.) § 3231. After a jury trial, Petitioner was convicted on January 23, 1992, of fourteen counts of mail fraud in violation of 18 U.S.C. §§ 2 and 1341, and six counts of transporting fraudulently obtained funds in interstate commerce in violation of 18 U.S.C. §§ 2 and 2314 (the National Stolen Property Act).

On appeal to the United States Court of

Appeals for the Sixth Circuit, the finding of guilt was affirmed, but the application of the United States Sentencing Guidelines, 28 U.S.C. § 994, was reversed on July 28, 1992. See p. 7a, *infra.* Defendant's petition for rehearing with suggestion for rehearing *en banc* was denied on September 11, 1992. See p. 26a, *infra.*

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE AND RULES INVOLVED

The Federal Rules of Evidence are a codification enacted by Congress by Pub. Law 93-595, 88 Stat. 1926-1949, effective July 1, 1975, of this Court's promulgation of rules governing proceedings in the courts of the United States of America. Fed. Rules Evid. Rule 101, 28 U.S.C.A., as amended. The rules at issue in the present case are Rules 901(a) and 1001-1003.

RULE 901. REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

(a) General provision.

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

* * *

RULE 1001. DEFINITIONS

For purposes of this article the following definitions are applicable:

* * *

(3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. * * *

(4) Duplicate. A "duplicate" is a counterpart produced by the same impression

as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

RULE 1002. REQUIREMENT OF ORIGINAL

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

RULE 1003. ADMISSIBILITY OF DUPLICATES

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances that it would be unfair to admit the duplicate in lieu of the original.

STATEMENT OF THE CASE

In 1986, Joseph Parillo met with Richard Dale, chief executive officer of Western Insurance Companies, Western Fidelity Insurance Company, and the Richard Dale Agency (hereinafter all three companies referred to as "Western") (Richard Dale at TR I-2-3).

Mr. Parillo presented Mr. Dale with a proposal for Western to issue whole life insurance policies with an annuity rider (Richard Dale at TR I-4-5). Parillo and his firm, Parillo Financial Holding, would be the exclusive general agent for these "annuity accumulator" policies; he would recruit and train a sales force (Richard Dale at TR I-5).

Up to that point, the great majority of Western's policies were individual medical insurance for small businesses and self-employed individuals, with about five percent (5%) life insurance (Richard Dale at

TR I-3-4). Western was licensed to sell insurance in approximately forty (40) states, including Ohio (Richard Dale at TR I-7).

Joseph Parillo brought a sample policy to the meeting that had been issued by another company (Richard Dale at TR I-7). The conversation between Parillo and Dale is in dispute (Joseph Parillo at TR V-5-14; Richard Dale at TR I-11-12, 16, 18-21).

Richard Dale decided that it would be advantageous for Western to issue such insurance/annuity because it would improve their taxation category (Richard Dale at TR I-8), because it kept Western solvent (Jerry McCreight, CPA, at TR VI-54), and because it would generate a lot of income to Western (Leland Kohutek at TR III-65). After Mr. Dale had decided that Western would provide the proposed insurance, he had Leland Kohutek, the president of Western Fidelity Insurance Company, join the meeting (Leland

Kohutek at TR III-58-59, 62). Dale gave Kohutek the policy and told him to change the name at the top to Western (Leland Kohutek at TR III-60).

On November 10, 1986, Western and Joseph Parillo entered into a contract for Parillo to sell the policies (Richard Dale at TR I-24). The Western policy was filed with the Ohio Department of Insurance prior to being sold (Leland Kohutek at TR III-61-62). This policy was never offered into evidence.

The terms of the contract of insurance are in dispute. No authenticated insurance contract which was in existence at the time specified in the indictment was in evidence (Offer of Evidence at TR IV-69-71, 74-75). There was a great deal of testimony as to changes made in the policy over time, but the prosecution never produced a single signed or authenticated contract, nor offered any reason for their inability to

do so.

Joseph Parillo advertised in Ohio for agents to sell the policy to Ohio residents (Harold Yinger at TR II-43-44). The agents would explain the contract to the customers pursuant to Parillo's instructions and ask for a check made payable to Western Fidelity Insurance Company. They would then transmit the checks through Joseph Parillo to Western (Leland Kohutek at TR III-73). Western would issue a policy and a delivery person would take the customer the policy and answer any questions (Richard Dale at TR I-32-33, II-18, Bill Mackin at TR IV-11-12).

Each customer would sign a delivery receipt (Leland Kohutek at TR III-73). The delivery receipt contained projections in accordance with the program as explained by Parillo (Leland Kohutek at TR III-69-73). The customer then would have ten (10) days to examine the policy and either keep it or ask for a refund (Leland Kohutek at TR III-

117). It is controverted whether the delivery receipts were kept by Parillo or whether the original or a copy was sent to Western (Joseph Parillo at TR V-67-68).

Western hired Bill Jefferies to act as a liaison between Parillo and Western (Richard Dale at TR II-7-9). Jefferies brought a "required agent memorandum" to Ohio for the agents to sign, which stated that they had read the policy form and understood the program (Richard Dale at TR II-26-27). They did not have time to read the form before signing it (Bill Mackin at TR IV-12-13, Steven Ritchey at TR IV-48-50, Harold Yinger at TR V-23-25), although the reason for that is disputed (Joseph Parillo at TR V-23-25).

Joseph Parillo resigned as an agent of Western (Joseph Parillo at TR V-52). Western continued to sell the policy under several different names for approximately eighteen months (Richard Dale at TR II-15-

18).

On September 11, 1990, defendant Joseph Parillo was indicted on fourteen (14) counts of mail fraud in violation of 18 U.S.C. §§ 2 and 1341 and six (6) counts of transporting funds taken by fraud in interstate commerce in violation of 18 U.S.C. §§ 2 and 2314. On January 23, 1991, the jury returned a verdict of guilty on all counts.

REASONS FOR GRANTING THE WRIT

The issue presented here is of great importance because it affects every trial, civil or criminal, in which documentary evidence is in issue. The effect of the decisions below is that for purposes of the Best Evidence Rule a "duplicate" is anything which differs from the original in an explicable manner. In upholding this ruling, the United States Court of Appeals for the Sixth Circuit places itself in direct conflict with other circuits and the plain meaning of Article X of the Federal Rules of Evidence.

Certiorari is sought not because the decisions in the courts below were merely erroneous, but because the decisions emasculate and deny an entire Article of the Federal Rules of Evidence. The holding below is squarely in opposition to the very principles of rule of law, *stare decisis*, and due process, and can not stand.

I.

The implicit holding that unavailability and lack of fault need not be shown before introducing secondary evidence of material contract terms is in conflict with decisions of this Court.

Petitioner was convicted on the grounds that he materially misrepresented the insurance policy that he and his sub-agents were selling. The contract was thus essential to prove that the representations made were incompatible with the policy. The trial court never found that the issued policy was unavailable. The prosecution produced a policy which had been created after the Petitioner had left the insurance company and put forward evidence as to how this policy differed from the policy which had been sold by Petitioner. It also produced a policy attached to an agent memorandum. That policy was never authenticated by anyone, it was merely

attached to something that was properly admitted.

Whether intended to prevent fraud as maintained by older writers, *see*, e.g., 1 Greenleaf, Evidence 93 (1842), or due to the dominance of the written word in the law as suggested more recently, *see*, e.g., McCormick on Evidence § 231 (3d ed. 1984), the best evidence rule has long been an essential component of American trial procedure.

One of the very first decisions of the predecessor to this Court was that an insurance policy must be presented as the best evidence of the terms of the policy. *Williams v. Craig*, 1 Dall 313, 1 Law.Ed. 153 (PA Sup. Ct. 1788)(M'Kean, C.J.).

In *United States v. Sutter*, 62 U.S. (21 How.), 170 (1858), this Court was confronted with two alleged grants of land to John Sutter pre-dating the treaty of Guadalupe Hidalgo. Despite the originals having been

destroyed in a fire, one grant was held to have been properly proven. Writing for the Court, Mr. Justice Campbell stated:

> We agree that the rule of law which requires the best evidence within the power or control of the party to be produced should not be relaxed, and that the court should be satisfied that the better evidence has not been wilfully destroyed nor voluntarily withheld. * * * Upon the whole evidence, we find that the grant and map filed with the petition in 1852, before the board of commissioners, have been proved. 62 U.S. at 175-76.

This rule of law has been consistently enforced within the American judicial system. There has been and can be no denying its force and authority. What the United States District Court for the Southern District of Ohio and the United States Court of Appeals for the Sixth Circuit have done is in violation of the holdings of this Honorable Court.

II.

The holding that a duplicate is anything which differs from a document in an explicable manner is in conflict with the plain language and intent of Rule 1001(4) and of other Circuit Courts.

The Federal Rules of Evidence define a "duplicate" as follows:

> A 'duplicate' is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original." Rule 1001(4).

The Sixth Circuit Court of Appeals below held that:

> "[i]t is the rule in this Circuit that a duplicate of a document is admissible into evidence to the same extent as the original unless there is a genuine conflict as to the copy's authenticity or unless its admission would be unfair. * * * The authenticity and comparative substance content of the pro forma policy filed with the Ohio Department of Insurance on May 19,

> 1988 which was admitted into evidence and the policies sold to customers were verified * * *. Further, a copy of the policy sold to Ohio consumers was part of an exhibit which was attached to a memorandum signed during October of 1987 by the defendant's Ohio agents. Since the defendant questioned the disappearance of the original policy and failed to assert a genuine conflict as to the May 19, 1988 policy's authenticity, the court did not abuse its discretion when it admitted the May 19, 1988 policy into evidence." Opinion of Sixth Circuit at 6, appendix at 19a-21a.

The Sixth Circuit holding that a blank policy created well after the policies at issue and admittedly differing from them is a "duplicate" within the meaning of the Federal Rules of Evidence so broadens the term as to render the best evidence rule meaningless.

Other Circuits have held that duplicates can be microfilm prints (*United States v. Carroll*, 860 F.2d 500 (1st Cir. 1988)), carbon copies (*United States v. Manton*, 107 F.2d 834 (2d Cir. 1938),

cert.denied 309 U.S. 664 (1940), or photocopies (*United States v. Gerhart*, 538 F.2d 807 (8th Cir. 1976). Where an item of evidence which purports to be a duplicate and which is material has been altered, the First Circuit held the evidence inadmissible. *United States v. Alexander*, 326 F.2d 736 (1964).

No other circuit appears to have ever so broadened the definition of the term "duplicate" to include a new contract form. Annotation, *Admissibility of Duplicates Under Rules 1001(4) and 1003 of Federal Rules of Evidence*, 72 ALR Fed 732.

The broad definition of duplicate used by the Sixth Circuit violates the spirit and intent of the best evidence rule. Judge Weinstein wrote, "[i]f we ask, 'what is the document being offered to prove?' the identity of the original often becomes apparent. If it is the terms of a contract, then the signed agreement is the contract

containing its terms." 5 Weinstein's Evidence § 1001(3)[01]. Weinstein also wrote, "[s]ome transactions, such as wills, contracts, and deeds, as a matter of substantive law take the form of a writing and any attempt to prove their happening necessarily involves the contents of the writing and brings the best evidence rule into play." 5 Weinstein's Evidence § 1002[03].

The Advisory Committee's Note to Rule 1003 states:

> When the only concern is with getting the words or other contents before the court with accuracy and precision, then a counterpart serves equally well as the original, if the counterpart is the product of a method which insures accuracy and genuineness. By definition in Rule 1001(4), *supra*, a "duplicate" possesses this character.

The definition of duplicate used by the Sixth Circuit does not insure accuracy or genuineness. Not only did the court admit an unsigned contract, but did not even

require an original blank contract which showed the contract terms as they were at the time of the alleged offense. Wigmore wrote:

> Testimony about a document cannot go very far without referring to its terms, and the instances in which some other fact about a document is material, and yet its terms are clearly not, are so few that in the other situations the natural tendency of courts is to lean if favor of requiring production; since production would have to be made sooner or later in proving the terms as a material part of the issue. 4 Wigmore, *Evidence* § 1242 (Chadbourn rev. 1972).

The courts below allowed the terms of this contract to be proved without ever providing the contract. This flies in the face of everything the best evidence rule stands for.

CONCLUSION

The admission of the after-created policy without a finding or even a showing of unavailability of the policy which was issued violates the best evidence rule and conflicts with prior decisions of this Court.

The Sixth Circuit's definition of "duplicate" is in conflict with every other court which has used the term, and cannot be allowed to stand. If "duplicate" is synonymous with "anything," then Article X of the Federal Rules of Evidence means nothing.

Respectfully submitted,

JOHN FRAZIER JACKSON
Ohio Sup. Ct. # 0024393
665 South High St.
Columbus, OH 43215
(614) 445-8823
Counsel of Record

PAUL CROUSHORE
Ohio Sup. Ct. # 0055524
601 South High Street
Columbus, Ohio 43215
(614) 224-9999
Counsel for Petitioner

customers.

Mr. SANDERS: That is the urgent memorandum and we have no objection.

THE COURT: Admitted.

- - -

Government's Exhibit 23 admitted into evidence.

- - -

MR. YONTZ: 24 is a sample policy of the insurance itself, of the insurance contract, the real product.

THE COURT: Is that the insurance contract itself, 24?

MR. YONTZ: Yes, your Honor, that was identified both by Mr. Dale and Mr. Kohutek.

MR. ALLISON: We do object to that.

THE COURT: The insurance contract itself?

MR. ALLISON: Absolutely, this insurance contract. This is not the

insurance contract. This is not the insurance contract that they were selling. If you look at the exhibit on the face of it, it didn't come into existence until May 19, 1988. The indictment states that this defendant ceased his operation as of January 15.

THE COURT: Can you agree on the date of the first delivery that was made of the contract of insurance annuity under the agency of Parillo?

MR. YONTZ: The very first policy sold?

THE COURT: Yes.

MR. YONTZ: I don't think we know exactly.

THE COURT: Have you got a copy of it?

MS. HARRIS: Your Honor, I believe that there was testimony by Mr. Kohutek who was responsible for filing each and every one of these policies there were three different filings. And the one we are talking about

here that was identified by Mr. Kohutek said that that was the exact same policy that Mr. Parillo gave him except for certain minor changes that had nothing to do with the misrepresentations that were made by the agents. The policy remained intact as the same one that Mr. Parillo gave them except the mortality table changed; the annuity rider changed from 18% to 16%, which was more beneficial to a person that bought the policy.

MR. YONTZ: That was the penalty for withdrawal.

THE COURT: I will admit that.

MS. HARRIS: And he also testified that there were slight wording changes to define how the dividends would be credited to the annuity fund. It had absolutely no change whatsoever on a substantial representations of the policy in reference to the misrepresentations as made by the sales agents.

MR. ALLISON: Your Honor, may I be heard?

THE COURT: Yes.

MR. ALLISON: This policy on its face did not come into existence until May, 19, 1988, approximately three or four

months after the end of this indictment.

THE COURT: What were they selling before that?

MR. ALLISON: I don't know; it's up to them to prove it.

MS. HARRIS: The testimony was they were selling that policy but for those three minor changes that I just told you about.

MR. ALLISON: They couldn't have been selling that because it didn't exist.

MR. YONTZ: The mortality table changes --

THE COURT: I will admit it.

MR. ALLISON: Your Honor, may I be heard?

THE COURT: No. You can put your objections into the record after I leave the bench until H won't have it, but not now.

MR. ALLISON: Thank you, your honor.

- - -

Government's Exhibit 24 admitted into evidence.

- - -

THE COURT: What's 25?

MR. YONTZ: 25 is the agent memorandum signed at the breakfast meeting that was required to be signed by the agents, identified by Steve Ritchey.

MR. ALLISON: No objection.

THE COURT: Admitted.

IV-72

MR. YONTZ: 26 is the second documents that were signed at that same meeting.

THE COURT: Same time?

MR. YONTZ: Same meeting.

THE COURT: Any objection?

MR. YONTZ: What purpose is it being

admitted for?

MS. HARRIS: If you are going to introduce a part of what was signed, you should introduce everything that was signed, and there was testimony to that effect.

THE COURT: Do you object?

MR. ALLISON: Yes.

THE COURT: It is admitted over your objection.

- - -

Government's Exhibits 25 and 26 admitted into evidence.

NOT RECOMMENDED FOR PUBLICATION
No. 91-3592

FILED
JUL 28 1992
LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA	)
	) ON APPEAL FROM
Plaintiff-Appellee,	) THE UNITED
	) STATES DISTRICT
v.	) COURT FOR THE
	) SOUTHERN
JOSEPH PARILLO	) DISTRICT OF
	) OHIO
Defendant-Appellant.	)

Decided and Filed_____

BEFORE: NELSON, BOGGS and KRUPANSKY, Circuit Judges.

PER CURIAM. Joseph Parillo (defendant) appealed the judgment of the district court in which he was found guilty by the jury as the principal in fourteen counts of mail fraud in violation of 18 U.S.C. § 1341 and 18 U.S.C. § 2, and six counts as the principal in transporting funds fraudulently obtained in interstate commerce in violation of 18 U.S.C. § 2314 and 18 U.S.C. § 2. The

court sentenced the defendant to thirty-six months imprisonment on each count to be served concurrently, two years of supervised release on counts 18-20 to be served concurrently, and a special assessment fee of one thousand dollars. The defendant timely appealed both the judgment and sentence.

On September 11, 1990, the grand jury in the Southern District of Ohio returned an indictment charging the defendant with fourteen counts of mail fraud and six counts of interstate transportation of funds fraudulently obtained. Counts 1 through 14 alleged that from August 9, 1987 to October 28, 1987, fourteen individuals returned postcards

[-2-]

in response to a mail solicitation initiated by Parillo to induce the purchase of insurance policies. Counts 15 through 20 alleged that on or about September 29, 1987

to November 1, 1987, Parillo unlawfully transported in interstate commerce from Columbus, Ohio to Texas, six fraudulently obtained checks each exceeding $5,000.

The facts which initiated the indictment disclosed that in the fall of 1986, Parillo met with the Chief Executive Officer ("CEO") of the Western Insurance Companies, Western Fidelity Company, and the Richard Dale Agency (collectively "Western") to discuss a proposal whereby Western would issue a whole life insurance policy with an annuity rider, called the "Annuity Accumulator."[1] Western reacted favorably to the defendant's proposal and entered into a contract with Parillo who was appointed as the general agent responsible for every aspect of marketing the Annuity Accumulator

---

[1] A whole life insurance policy is funded by a customer's life time premium payments. The policy matures at age 100 and accumulates cash equity value which is available to the insured after a specified time.

in Ohio.

Briefly, the Annuity Accumulator policy could be purchased for $6,250 per unit; $1,250 of which purchase price was earmarked as the initial payment for life insurance. The remaining $5,000 funded an annuity on behalf of the insured. The annual premium for the policy was two hundred dollars. The annuity payable to the insured was interest bearing. Interest from the annuity, which accrued at an anticipated annual rate of 10%, was in addition to dividends if any were declared and could be applied against the annual life insurance premium.

Pursuant to Ohio law[2], Western filed the initial 1986 version of the policy with the Ohio Department of Insurance for qualification in March of 1987. There-

---

[2] Ohio Rev. Code Ann. § 3902.03 (Anderson 1989) mandates that an insurer must file the proposed pro forma insurance policy, related forms and a prospectus with the Ohio Department of Insurance for approval.

after, Western filed a sequence of three proposed modifications of the policy with the Department of Insurance for qualification under Ohio law in September and October

[-3-]

of 1987 and May 19, 1988. The president of Western testified that in September of 1987, Western adopted and applied the national 1980 mortality tables to its policies and reduced the penalty for early withdrawal of all or part of the monies in the annuity rider from a constant eighteen percent to sixteen percent in the first three years, decreasing two percent per year thereafter. He further stated that the October of 1987 modifications were not substantive changes.[3] In the May of 1988 modification, language was included to clarify the dividend

---

[3] For example, the annuity rider was originally denominated as an annuity deposit. The October 1987 filing changed the designation to "annuity rider."

provision and stated that such dividends, if and when declared, would be permitted to accumulate and credited to the annuity fund unless the insured elected to draw down the dividends directly. A copy of the policy that had been filed with the Department of Insurance on May 19, 1988, was admitted into evidence. When the government proffered its proof, the parties acknowledged that they had been unable to conform the policies which had been sold to Parillo's customers with any of the various pro forma policies that had been filed with the Ohio Department of Insurance. The defendant objected to the admission of the filed May 19, 1988 pro forma policy initially charging that it was not the pro forma policy which had been filed with the Ohio Department of Insurance in March of 1987, was not representative of the policies which had been sold to Parillo customers, and consequently, did not constitute the "best evidence." The

district court overruled the objection.

Parillo's merchandising of the Annuity Accumulator in Ohio was initiated by the purchase of postcard "leads" from a Texas mailing firm. The Texas firm targeted Ohio residents over 55 years of age who had an annual income that exceeded $30,000. The mailings included detachable postcards which solicited the Ohio targets to return completed cards to the Texas company indicating an interest in the policy. Parillo then purchased the returned postcard leads at $8.50 per affirmative response and employed

[-4-]

telemarketers to contact the Ohio respondents and arrange appointments with Ohio sales agents to discuss the policy further.

The defendant employed and commenced training Ohio sales agents in June of 1987. Parillo's training sessions misrepresented

the entire Annuity Accumulator policy concept to his sales staff. Briefly, Parillo advised the sales personnel that payments received from customers would be invested in first mortgages on real estate which would result in profits that would permit participants to double their investment in five and one-half years while their annuity in the policy earned an additional ten percent interest. He instructed his trainees that the Annuity Accumulator qualified as an IRA rollover; that invested funds would remain liquid against which a participant could borrow up to 80% of equity; and that the life insurance coverage of the Annuity Accumulator required no annual premium payments. Parillo's agents testified that during an October 8, 1987 training session they were required to sign a Western memorandum indicating that they had read the insurance policy which they were to sell to

Ohio customers; however, they had not been given time to review the policy. Both the memorandum and copy of the policy attached thereto were admitted into evidence without objection.

Parillo's misrepresentations were incorporated into customer sales presentations. The court admitted a copy of Parillo's sales brochure into evidence without objection. Interested Ohio participants were instructed to mail their enrollment checks, made payable to Western, to Parillo's Texas headquarters. All of the checks exceeded $5,000. Thereafter, the checks were transmitted to and negotiated by Western. The Parillo sales agent delivered the policy to the owner. A customer had ten days within which to examine a purchased policy and seek cancellation and a refund. All customer inquiries were directed to and answered exclusively by Parillo. The court admitted six checks into evidence without

objection.

[-5-]

Parillo's Ohio agents realized that he had misrepresented the policy to them when they obtained a copy of the policy and prospectus which had been filed with the Ohio Department of Insurance.[4] The prospectus and policy which had been supplied by Parillo and used by them to solicit customers differed materially from those filed with the Ohio Department of Insurance. One agent, Bill Mackin (Mackin), subsequent to discussing the substantive discrepancies between the policies with executives of other insurance companies, filed a complaint against Parillo with the Department of Insurance.

Upon becoming aware of the developing legal conflicts and Parillo's misrep-

---

[4] This brochure was filed with the Ohio Department of Insurance on October 7, 1987.

resentations, his entire Ohio staff resigned. Thereafter, Parillo resigned as an agent for Western. Subsequently, the Ohio Department of Insurance entered into a consent agreement with Western that protected and reimbursed all parties that had purchased Annuity Accumulator policies. No Ohio participant suffered a monetary loss.

After the jury returned its verdict of guilty, the court denied the defendant's motion for acquittal notwithstanding the verdict.

The court sentenced Parillo to thirty-six months imprisonment and two years of concurrent terms of supervised release on counts 18-20, and a special assessment of one thousand dollars. The court overruled defendant's objections to the presentence report. It concluded that pursuant to U.S.S.G. § 2B1.1, the loss charged in the indictment included the possibility of

losses that could have accrued had the fraud been carried to its likely fruition. Consequently, the court calculated that Parillo sold 321 units of the Annuity Accumulator to approximately 200 Ohio residents for approximately $2,006,250, plus Texas sales which amounted to $1,793,200. After the trial court combined the total of the fraudulently obtained funds, i.e., $3,799,450, it enhanced the defendant's base offense level of six by ten points pursuant to U.S.S.G. § 2F1.1 based

[-6-]

upon the combined Ohio and Texas monetary figures. The court also enhanced the sentence by two additional points as a victim related adjustment pursuant to U.S.S.G. § 3A1.1 because the targeted "elderly" population was considered to be vulnerable.

Parillo timely filed his notice of appeal on June 14, 1991.

In his first assignment of error, the defendant charged that the district court abused its discretion when it admitted the May 19, 1988 policy as the pro forma of the policy which had been filed initially by Western with the Ohio Department of Insurance in March of 1987 because it did not conform to the Best Evidence Rule, Fed.R.Evid. 1002, without a preliminary showing that the original contract was not obtainable, lost or destroyed. It is the rule in this Circuit that a duplicate of a document is admissible into evidence to the same extent as the original unless there is a genuine conflict as to the copy's authenticity or unless its admission would be unfair. United States v. Murray, 785 F.2d 311 (6th Cir. 1986). Parillo's misrepresentation in the instant action targeted his subagents and the individuals to whom they sold the Annuity Accumulator policy. Accordingly, the policy which would

represent the best evidence was the one which had been presented to the policyholders as a prospectus to induce the sale. The six checks offered into evidence to support counts 15 through 20 of the indictment were dated either in September or October of 1987. The authenticity and comparative substance content of the pro forma policy filed with the Ohio Department of Insurance on May 19, 1988 which was admitted into evidence and the policies sold to customers were verified by the president of Western, Parillo's agents, as well as the individuals that purchased the policy. Further, a copy of the policy sold to Ohio consumers was part of an exhibit which was attached to a memorandum signed during October of 1987 by the defendant's Ohio agents. Since the defendant questioned the disappearance of the original policy and failed to assert a genuine conflict as to the May 19, 1988 policy's authenticity, the

court did not abuse its discretion when it admitted the May 19, 1988 policy into evidence. Accordingly, this assignment of error is without merit.

[-7-]

The defendant's second assignment of error is equally without merit. He asserted that Mackin's hearsay testimony concerning two unidentified insurance company executives who evaluated the legality of the pro forma prospectus here in controversy was inadmissible. Mackin's testimony, however, was offered to explain his course of action after he discovered that the sales prospectus issued by Parillo was in conflict with the one on file with the Ohio Department of Insurance. Since the purpose of the hearsay was admitted to explain Mackin's course of conduct and not to prove the illegality of Parillo's conduct, the trial court's ruling was not clearly erroneous.

The defendant's third assignment of error is worthy of consideration and further analysis. In arriving at defendant's base offense level for sentencing purposes the district court, pursuant to U.S.S.G. § 2B1.1, enhanced his base offense level of six by ten points presumably because it projected the aggregate probable loss of the perpetrated fraud, i.e., the loss that could have accrued had it been carried to its likely fruition, to be between two and five million dollars. Mindful of the records disclosure that Western had held all Annuity Accumulator policy holders harmless from any financial or other loss, the district court's disposition appears to be erroneous when considered within the parameters of Application Note 7 in the Commentary to U.S.S.G. § 2F1.1, which would indicate that the loss in issue was not the full amount invested by the policy holders, i.e., the purchase price of the Annuity Accumulator

units, but rather the difference between what the defendant had promised and what he had ultimately delivered.

In recalculating the defendant's base offense level pursuant to Application Note 7 in the Commentary to U.S.S.G. § 2F1.1, the trial court's attention is directed to the analogue that confronted the Seventh Circuit in *U.S. v. Schneider*, 930 F.2d 555 (7th Cir. 1991). In its disposition of *Schneider*, the court distinguished between a fraud wherein the perpetrator intended to pocket the entire inducement and had no intention of performing the promised undertaking and a fraud that had been committed to obtain a contract that the perpetrator might otherwise not obtain, but intended and was able to

[-8-]

perform and intended to pocket, as in the instant case, only the difference between the advanced payment and his costs of doing

business-- in this case the defendant's commissions which accrued from the sale of the Annuity Accumulator policies.

Accordingly, the district court's calculation of the enhancement of the defendant's base offense level of six by ten points is reversed and remanded for recalculation and resentencing.

The defendant, has also correctly argued that the government has failed to prove that the victims of this fraudulent scheme were particularly vulnerable because of age to warrant a two-level enhancement under U.S.S.G. § 3A1.1. Although the defendant targeted Ohioans over 55 years of age who made over $30,000 a year, the factors of age and income alone do not make members of the group unusually vulnerable under a correct interpretation of § 3A1.1 United States v. Moree, 897 F.2d 1329, 1335-36 (5th Cir. 1990). Accordingly, this court reverses the district court's imposition of

a two-level enhancement based upon victim vulnerability.

Upon a review of the record in its entirety, the briefs and arguments of counsel the defendant's conviction is hereby AFFIRMED. The district court's calculation of the enhancement of the defendant's base offense level of six by ten points and its calculation of the two-level enhancement of defendant's base offense level for victim vulnerability are REVERSED and REMANDED for resentencing in accordance with this opinion.

ISSUED AS MANDATE: September 21, 1992

COSTS: None

FILING FEE. . . . $

PRINTING. . . . . $

TOTAL . . . . . $

No. 91-3592

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
SEP 11 1992
LEONARD GREEN, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH PARILLO,

Defendant-Appellant.

ORDER

BEFORE: NELSON and BOGGS, Circuit Judges; and KRUPANSKY, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/S/

Leonard Green, Clerk